

NATIONAL
INDIAN
GAMING
COMMISSION

JUL 9 1999

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Dear Mr. Grellner:

This is in response to the letter to the National Indian Gaming Commission (NIGC) of January 13, 1998, from the late Edward Starr, Jr. as modified by his letter of September 11, 1998, and as further modified by the letter of May 17, 1999, requesting that the NIGC review the Cheyenne and Arapaho Tribes' (Tribes) proposal to run card game tournaments at the Tribes' Lucky Star Bingo Hall and determine the games' classification under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701, et seq., 1983.

The proposed card game tournaments will involve the play of pitch, gin and blackjack at tribal gaming facilities. The proposal calls for patrons to pay an entry fee and receive tokens for use in card play. The tokens do not represent money. They are a means for keeping score and are not "cashed out," that is, redeemed for money, as would be the case with chips at a casino. Prize winners will be determined in tournament play by elimination. The gaming operation will collect an administrative fee to cover the expense of operating the tournaments.

The house will not compete or participate in any way as a player which might win or lose; although, the gaming operation will be awarding the advertised prizes to successful tournament participants.

Based upon the information currently available, the NIGC has concluded that the Tribes may operate pitch and blackjack tournaments as class II games. Poker may not be played as a class II game under any circumstances. We have insufficient information to conclude that gin or bridge may be played in tournament format as a class II game.

Background

Pursuant to the IGRA, 25 U.S.C. § 2703(7)(A)(ii), class II gaming includes non-banking card games if such card games:

- (i) are explicitly authorized by the laws of the State, or
- (ii) are not explicitly prohibited by the laws of the State, and are played at any location in the State.

but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games

Excluded from class II are "banking card games including baccarat, chemin de fer, or blackjack (21)." 25 U.S.C. § 2703(7)(B)(i)

No Oklahoma law provides explicit authorization for the card games described in the Tribes' correspondence, and, therefore, a determination as to the lawfulness of their play at the Tribes' bingo hall will depend upon whether the criteria of subsection II. above are met.

Title 21 Oklahoma Statutes, Section 941, expressly prohibits, "poker, roulette, craps or any banking or percentage, or any gambling game played with dice, cards or any device for money, checks, credits or any representation of value." In the context of card games, therefore, Section 941 appears to prohibit

- a. poker for money or any representation of value
- b. [to the extent cards might be used] any banking or percentage game for money or any representation of value
- c. [to the extent cards might be used] any gambling game for money or any representation of value.

Title 21 Oklahoma Statutes Section 981 provides.

1. A "bet" is a bargain in which the parties agree that, dependent upon chance, or in which one of the parties to the transaction has valid reason to believe that it is dependent upon chance, one stands to win or lose something of value specified in the agreement. A bet does not include

- c. offers of purses, prizes or premiums to the actual participants in public and semi public events, as follows, to wit: Rodeos, animal shows, expositions, fairs, athletic events, tournaments and other shows and contests where the participants qualify for a monetary prize or other recognition. This subparagraph further excepts an entry fee from the definition of "a bet" as applied to enumerated public and semipublic events.

Because Section 981 exempts the entry fees and prizes which characterize tournament participation from the definition of a "bet," the Tribes assert that card games, which might otherwise be treated as gambling games, may be played in tournament format at the Lucky Star Bingo Hall.

Clearly "public and semi public . . . tournaments . . . and contests where the participants qualify for a monetary prize" are lawful in Oklahoma as a result of 21 OS § 981. The questions to be resolved, then, are:

- a. Can a card game be the subject of a tournament under Oklahoma law?
- b. Would a card tournament constitute "gaming" within the meaning of the Indian Gaming Regulatory Act, and if so, would it be class II or class III?

The Oklahoma Attorney General and the U.S. Attorney for the Western District of Oklahoma have each provided opinions, but neither opinion actually focusses on the larger questions caused by the interplay of Sections 941 and 981 with IGRA, to wit, can any card games be played lawfully in tournament format in Oklahoma, and, if played on Indian lands, how are such games to be treated under IGRA?

Discussion: Card Tournaments

The Attorney General takes the position that "tournament gambling" violates Oklahoma law. The problem is that the quoted phrase mixes two concepts, tournaments and gambling, and does not shed light on the relationship between Section 941 and Section 981. By its nature the kind of gambling prohibited by Section 941 involves payment of money in the hope of winning something, i.e. "a bet." A tournament participant, however, can pay money as an entry fee in the hope of winning a prize and, in doing so, does not make "a bet" under Section 981. In trying to reconcile these sections, it seems clear that an activity may be either gambling or a tournament under Oklahoma law, but not both.

Gambling usually involves the traditional elements of chance, prize and consideration¹. While some kinds of tournaments, such as pool or darts, may involve sufficient skill so as to reduce the role of chance, there is nothing in Section 981, 1c which suggests that "tournaments" are limited to activities which depend entirely upon skill². In fact, it appears that the whole purpose of Section

¹ Federal Communications Commission v. American Broadcasting Company, 349 U.S. 284 (1954). In In Re: Initiative Petition No. 363, State Question No. 672, 927 P.2d 558 (Oklahoma, 1996), the Supreme Court of Oklahoma recognized that gambling and gaming have similar meanings, but noted that "gambling" is the term which is recognized in the jurisprudence of Oklahoma. The term "bet" is defined by the Oklahoma legislature to include chance as an element. 21 OS § 981.1

² All card games involve an element of chance, but most card games also involve significant skill. The extent to which the outcome of card games is determined by the players' skill varies, but it should be greater in a tournament format, where a number of hands will be played before prize winners are determined. "Over a long period, a more skilled player will outdistance his less skilled opponent in games or money won. The more pronounced his advantage in skill is, the sooner the difference will show up." Searne, Searne's New Complete Guide to Gambling

981.1 is to exempt certain chance-dependent activity from the general prohibition on gambling. Stated otherwise, since there can be no gambling without an element of chance, Section 981.1 would not be necessary unless it was intended to cover activity involving chance. There is, therefore, no legal or factual basis for asserting that a Section 981 tournament must be a contest of skill, only, and cannot include a game in which chance is present.

The next question is: in addition to being an activity in which chance may be present, what does the word "tournament" in Section 981 mean? There are two characteristics of tournaments apparent in the statute: first, they are "public and semipublic events"; second, "the participants qualify for a monetary prize or other recognition." Section 981.1c. The plain and common meaning of the word "tournament" is a "contest involving a number of competitors who vie against each other in series of elimination games or trials." Webster's II, New College Dictionary (Houghton Mifflin Company, 1995). There is nothing inherent in either these statutory characteristics or the dictionary definition of a tournament which would exclude card games.

In arriving at a functional definition of "tournament" in Section 981, application of the doctrines of *ejusdem generis* or *nosctur a sociis*³ provides some insight. In Section 981.1c, the list of associated terms is a varied one: "Rodeos, animal shows, expositions, fairs, athletic events, tournaments and other shows and contests where the participants qualify for a monetary prize or other recognition." The enumerated activities require that the participants demonstrate some skill, and, therefore the word "tournament," in this context, appears to contemplate activities involving skill other than those which are enumerated (i.e. a tournament would not be an athletic contest, etc.). The play of cards in a tournament format fits within the enumerated words. Card tournaments, in which a winner emerges by elimination over a number of hands, by demonstrating skill during play, have many of the characteristics of the contests enumerated in Section 981.1c.⁴ By contrast such tournaments bear little resemblance to the fast paced winning and losing of the of non-card games (roulette and craps) enumerated in Section 941.

The recent opinion of the Oklahoma Attorney General, in which he found "money hunts" constituted gambling, was based upon the fact that the participants' entry fees were held as a pool to be paid to the winner as a prize⁵. The Attorney General's opinion also expressed doubt that a money hunt could qualify under Section 981 as a public or semi-public event. The Tribes' most

(Simon & Shuster, Inc., 1986) at page 30

³ *Ejusdem generis* and *nosctur a sociis* are related principles of statutory construction. Peoples State Bank and Trust Company v. Brooks, 750 P.2d 479 (Oklahoma, 1988). The latter is probably more applicable to the current task of ascertaining the meaning of a particular statutory term by reference to the associated words. See, Miller v. State, 827 P.2d 875 (Oklahoma, 1992).

⁴ Scarne, *id.*

⁵ Oklahoma Attorney General Opinion 94-5 dated March 29, 1990.

recent letter, taking account of the Attorney General's opinion, made it clear that the prize to be awarded to successful participants in the Tribes' card tournament would be established independently of the pool of entry fees. Tournament participants would not be trying to win money from one another, but would be competing instead to win the prizes offered by the Tribes. The Tribes also pointed out that the card tournaments would be public or semi-public events, presumably because they would be open to the same members of the general public who patronize the Lucky Star Bingo Hall.

Unequivocally, the legislature by enacting Section 941, intended to keep casino gambling out of Oklahoma, but, just as clearly, the Oklahoma legislature wanted to allow some kinds of games involving chance to be played in tournament format, complete with entry fees and prizes." Indeed card games which are not commonly associated with casino gambling, such as bridge, are universally played in tournament format." The only relevant difference between the games of blackjack and bridge is that the former is normally associated with gambling; however, just as a bridge game could be played in a format which would violate Section 941 (e.g. "penny-a-point"), there seems to be no reason that, in the proper format, blackjack could not be played as a tournament game.

Based on the foregoing, we have concluded that tournaments which involve the play of card games are not prohibited in Oklahoma.

Discussion: Card Tournaments Under the Indian Gaming Regulatory Act

By virtue of 21 OS § 981, Oklahoma has chosen to exempt tournaments, which may require an entry fee and award a prize, from the definition of betting under state law. As discussed above, however, but for the operation of Section 981, all the elements of gaming are present in such a card tournament. Because state law cannot operate to change the definition of gaming under IGRA, ~~play of card tournaments involving consideration, chance and prize, in facilities subject to~~ IGRA, would constitute gaming within the meaning of IGRA.

This determination raises the issue of classification of tournament card games in Oklahoma under IGRA.

² In Arizona, the state supreme court created a tournament exception to that state's statutory prohibition on gambling. State v. American Holiday Association, 151 Ariz. 312, 727 P.2d 807 (1986).

The web site of the American Contract Bridge League, www.acbl.org, contains information on all tournaments within the ACBL's purview and indicates that such tournaments are held in Oklahoma. Although the information on the web site makes it clear that entry fees are charged for such tournaments, it is not known whether prizes (other than Masters' Points) are actually awarded to tournament winners in Oklahoma.

The U.S. Attorney, relying upon the express mention of poker in Section 941, states that poker "and similar games," even if played in tournament format, would be class III games under IGRA because their play would violate an explicit state law prohibition. The U.S. Attorney is clearly correct in his characterization of poker. His use of the phrase "and similar games," which does not appear in Section 941, is apparently shorthand for the prohibition in that statute of "any banking or percentage game" and "any gambling game," to the extent that cards are involved.⁸

Banking games, as commonly understood and as defined in NIGC regulations, 25 C.F.R. § 502.11, are games in which the banker (usually the house) takes on, that is, competes against, all players, collecting from losers and paying winners. Percentage games are those in which the house receives a percentage of the wager or the winnings.

As indicated above, IGRA excludes banking card games including blackjack (21) from class II. The NIGC has consistently taken the position, however, that blackjack played as a non-banking card game can be a class II game. This view is consistent with the discussion in the Senate Report on IGRA which describes the distinction between banking and non-banking card games as follows:

Section 4(8)(A)(ii) provides that certain card games are regulated as class II games, with the rest being set apart and defined as class III games under Section 4(9) and regulated pursuant to Section 11(d). The distinction is between those games where players play against each other rather than the house and those games where players play against the house and the house acts as banker. . . .

S. Rep. No. 100-446, 100th Cong., 2nd Sess. 9-10 (1988).

~~Class II card games subject to IGRA must also "be played at any location in the state." This requirement has been satisfied by NIGC observation of pitch and blackjack tournaments being played openly in Oklahoma.~~

Conclusion

⁸ The phrase "similar games" may also be a reference to the fact that "poker" can be any one of a number of games, all of which, according to Scarne, have two elements in common: the value or rank of each hand, and at the showdown the hand cannot consist of more than five cards, even though more cards are used in many poker variations. Thus the statute's express prohibition on poker would appear to apply to all such games, from five card draw to seven card stud, and the many variations which have arisen over time. Scarne, supra fn. 2 at 671-672.

At the Tribes' request NIGC field investigators have visited sites where such tournaments were being played.

Based upon the foregoing analysis, it is our opinion that any card game which is lawfully played in tournament format at any location in Oklahoma may be played in tournament format in the Lucky Star Bingo Hall as a class II game¹⁰. Thus, blackjack, when not played as a house banked game, and pitch,¹¹ all meet the criteria of 25 U.S.C. § 2703(7)(A)(ii)(II). We have insufficient information to determine whether or not bridge and gin are played in the state in a tournament format that involves the elements of consideration and prize.

Poker and its variants, however, are subject to an explicit prohibition in Oklahoma and, therefore, cannot be played at the Tribes' facilities as a class II game under IGRA, even in tournament format. Our determination with respect to poker is, perhaps anomalous, but the inevitable result of the interplay of Sections 941, 981 and IGRA.

To summarize:

Section 941 prohibits poker and other gambling card games;

Section 981 removes from the definition of a "bet" (and hence from the state law definition of gambling) the payment of entry fees to compete for prizes, thereby allowing card tournaments;

IGRA allows card games to be played as class II unless they are explicitly prohibited by state law (if they are played at any location in the state);

Poker, being subject to an express statutory prohibition, cannot, under any circumstance, be a class II card game;

Other card games which are played within the state in tournament format are not subject to an express prohibition and may, therefore, be played in tournament format as class II games under IGRA.

In operating such class II card games, care must be taken to ensure that the tournament format does not become a sham and that the games are in fact being played as tournaments within the meaning of 21 OS § 981. Factors such as the duration of the contest, the size of the prizes and

¹⁰ Although, as discussed above, tournament blackjack does not violate Oklahoma's prohibition on gambling, it is still gaming within the meaning of the Indian Gaming Regulatory Act. That is, so long as there is activity on Indian land involving the traditional elements of consideration, chance and prize, that activity is subject to the provisions of IGRA. Even though *state law*, 21 OS § 981, exempts tournament entry fees from the definition of "bet," for purposes of *federal law* the card tournaments described herein would constitute gambling.

¹¹ As noted previously, the NIGC has observed the play of blackjack and pitch in tournament format in Oklahoma.

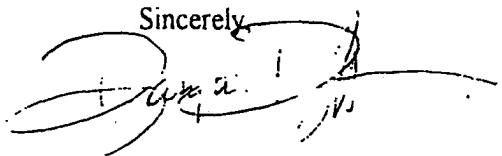
the number of persons who receive prizes for play in each tournament will be especially relevant on the issue.

As stated above, in order to qualify as a class II game, the Tribes must also take care to conform to any state law or regulation limiting the hours or periods of operation of the card games or wagers or pot sizes ¹²

Please be advised that this legal opinion is advisory in nature only and that it may be superseded, reversed, revised or reconsidered by a subsequent General Counsel or Chairman of the NIGC. Furthermore, if there are any changes made to the game as described, such changes might materially alter our conclusion.

If you have any questions, please call me or Richard Schiff at (202) 632-7003.

Sincerely,



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¹² Card tournaments observed by the NIGC have ranged in duration from one night to a month, and the prizes have been modest in proportion to the entry fee, e.g. \$300 for a \$10 entry fee. Other tournaments may not be so modest in their payoff, e.g. NIGC representatives have noted the existence of a two day pool tournament with a \$50 entry fee and \$9000 prize, with a possibility of a \$10,000 bonus for winning two tournaments. In the absence of specific state regulations limiting wagers on card games, the only monetary limitation on card tournament prizes would be that expressed in the text, i.e., the tournament format must not be a sham.

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